

IN THE
Supreme Court of the United States

October Term, 1977

No. 77-84

Supreme Court, U. S.

AUG 15 1977

MICHAEL RODAK, JR., CLERK

MICHAEL SMITH, et al.,

Appellants,

-v.-

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH
CAROLINA, et al.,

Appellees.

**MOTION TO AFFIRM DECISION OF THE THREE-JUDGE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA AND
BRIEF IN SUPPORT OF SUCH MOTION**

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No. _____

MICHAEL SMITH, AMERICANS UNITED FOR THE SEPARATION
OF CHURCH AND STATE, WENDELL G. DAVIS AND
WOODROW WILSON ROBBINS, *Appellants,*

-v.-

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH
CAROLINA; WILLIAM A. DEESE, JR., *Chairman thereof, and*
IRWIN BELK, VICTOR S. BRYANT, HUGH CANNON, PHILIP
G. CARSON, JULIUS CHAMBERS, T. WORTH COLTRANE,
WAYNE A. CORPENING, DR. HUGH DANIEL, JR., JACOB H.
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THOMAS J. WHITE, JR., GEORGE D. WILSON and GEORGE
M. WOOD, Members thereof; WILLIAM CLYDE FRIDAY,
President of the University of North Carolina; THE NORTH
CAROLINA EDUCATION ASSISTANCE AUTHORITY; STAN C.
BROADWAY, Executive Director thereof; and CHARLES F.
GEORGE, JR., J. RUSSELL KIRBY, ROGER GANT, JR., VICTOR
E. BELL, JR., EDWIN C. BAKER, MRS. CARRIE W. HARPER,
WILLIAM H. PLEMMONS and BURKETTE RAPER, Members
of the Board of Directors thereof; BELMONT ABBEY
COLLEGE, INC.; and PFEIFFER COLLEGE, INC., *Appellees.*

**MOTION TO AFFIRM DECISION OF THE THREE-JUDGE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA AND
BRIEF IN SUPPORT OF SUCH MOTION**

MOTION

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, as amended, Appellees respectfully move the Court to affirm the decision of the Three-Judge United States District Court for the Western District of North Carolina, filed March 30, 1977, and the judgment entered in accordance therewith May 5, 1977. The grounds are that prior decisions of this Court support the District Court's decision and the questions presented by this appeal do not present a substantial federal question requiring review by this Court. In support of this Motion, Appellees submit the following brief.

BRIEF

OPINION BELOW

The per curiam opinion of the Three-Judge United States District Court for the Western District of North Carolina (Haynsworth, Chief Circuit Judge; Jones, Chief District Judge; and McMillan, District Judge) has not been officially reported. It is reprinted in full beginning at page A-1 of the Appendix to the Jurisdictional Statement (hereinafter "J.S.").

JURISDICTION

The District Court entered judgment in this case on May 5, 1977 (reprinted at page A-26 in the J.S.). Notice of appeal was filed with the District Court on May 16, 1977. The jurisdiction of this Court to hear this case rests on 28 U.S.C. §1253. The Jurisdictional Statement was filed with this Court on July 14, 1977, and received by the Appellees on July 16, 1977.

STATUTES INVOLVED

Statutory provisions of the State of North Carolina and the United States of America are involved in this appeal. These statutory provisions establish three aid programs for college level students in North Carolina and are grouped by aid program:

1. State Contractual Scholarships for Needy North Carolinians ("Contract Program"): Chapter 744 of the 1971 Session Laws of the North Carolina General Assembly (now codified as N.C.G.S. §116-19, §116-20, §116-21, §116-22, reprinted at pages A-39 - A-42 in the J.S.), Chapter 875, Section 30 of the 1975 Session Laws of the North Carolina General Assembly, (reprinted at pages A-74 - A-80 in the J.S.), and Chapter 983, Section 56 of the 1975 Session Laws of the North Carolina General Assembly (Second Session) (reprinted at pages A-81 in the J.S.). Chapter 875, Section 30 of the 1975 Session Laws and Chapter 983, Section 56 of the 1975 Session Laws (Second Session) were parts of an appropriation act of the State of North Carolina for the biennium July 1, 1975 - June 30, 1977, and were before the District Court at the time of its decision. This appropriation act expired June 30, 1977, but the provisions contained therein for the Contract Program have been re-enacted in Chapter 802, §38 and §38.2 of the 1977 Session Laws of the North Carolina General Assembly (reprinted herein at 1-a-2-a).

2. North Carolina Legislative Tuition Grants ("Tuition Grants"): Chapter 875, Section 30 of the 1975 Session Laws of the North Carolina General Assembly (reprinted at pages A-79-A-80 in the J.S.). As stated above, Chapter 875, Section 30 of the 1975 Session Laws has now expired. The provisions contained therein for the Tuition Grants have been

re-enacted in Chapter 802, §38.1 and §38.2 of the 1977 Session Laws of the North Carolina General Assembly (reprinted herein at 1-a - 2-a).

3. North Carolina Student Incentive Grants ("Incentive Grants"): N.C.G.S. §116-209.19 (reprinted at pages A-75 - A-77 in the J.S.), Chapter 875, Section 36 of the 1975 Session Laws of the North Carolina General Assembly (reprinted at pages A-80 - A-81 in the J.S.), and 20 U.S.C.A. §1070(c) - §1070(c)-3. (reprinted at 1-b - 6-b).

N.C.G.S. §116-209.19 is the only section of N.C.G.S. §§116-201—116-209.22 having application to the student aid programs challenged by this case. The remaining sections of §§116-201—116-209.22 referenced by Appellants and reprinted at pages A-42 - A-78 in the J.S. do not appear to be directly material. Chapter 875, Section 36 of the 1975 Session Laws has also expired. Incentive Grants have been continued by Chapter 802, §2 of the 1977 Session Laws of the North Carolina General Assembly.

STATEMENT OF FACTS

A. *Aid Program Descriptions.* The Court is referred to the District Court Opinion for appropriate descriptions of the Contract Program (Paragraph A, pages A-2 - A-4 in the J.S.), Tuition Grants, (Paragraph B, pages A-4 - A-5 in the J.S.), and Incentive Grants (Paragraph C, pages A-5 - A-6 in the J.S.).

By regulation adopted by the Board of Governors and the State Education Assistance Authority, all three programs exclude from participation students enrolled in theology, divinity, religious education or other courses of study designed primarily for preparation in a religious vocation.

For the 1975-76 academic year, 8,835 needy students attending accredited private colleges and universities in North Carolina received \$4,214,855.00 from the Contract Program. The General Assembly appropriated \$4.6 million for the 1976-77 academic year for the Contract Program, but figures are not yet available on the number of needy students who will receive assistance through the program.

The 1977 North Carolina General Assembly increased Tuition Grants from \$200.00 per academic year to \$300.00 per academic year beginning 1977-1978. Preliminary figures indicate that in the 1976-77 academic year 23,160 students received Tuition Grants totaling \$4,186,069.00.

The 1977 North Carolina General Assembly has appropriated \$1,367,285.00 each year for the 1977-78 and 1978-79 academic years for Incentive Grants. These amounts will be matched by federal funds. Preliminary figures indicate that in the 1976-77 academic year \$613,150.00 went to 817 needy students at private colleges and universities and \$612,189.00 to 1,497 needy students at public colleges and universities.

B. *Belmont Abbey College, Inc. and Pfeiffer College, Inc.* Belmont Abbey College and Pfeiffer College are traditional undergraduate colleges whose primary purpose is education in the liberal arts, with a secondary purpose shared by other liberal arts colleges of presenting and examining ethical, moral and spiritual issues. Belmont Abbey College and Pfeiffer College are legally identical to the schools found constitutionally eligible to receive state aid in *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973); and *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976). (See charts printed hereinafter at pages 1-c - 5-c and at pages 1-d - 3-d, which show (1) that Belmont Abbey

and Pfeiffer have the same religious attributes as the *Tilton*, *Hunt* and *Roemer* schools [this chart was handed to the District Court at oral argument December 1, 1976] and (2) that, with references to the record, the facts on which the *Roemer* schools were found constitutionally eligible for public aid are present at Belmont Abbey College and Pfeiffer College [this chart was attached to Appellees' brief on the merits filed with the District Court]).

Appellants conceded at oral argument before the District Court that Belmont Abbey College and Pfeiffer College were not distinguishable from the *Roemer* colleges. The District Court found "no material distinction" between the *Roemer* colleges and Belmont Abbey College and Pfeiffer College (See opinion of District Court at page A-18 in the J.S.). Appellants do not challenge this conclusion in the Jurisdictional Statement and appear to concede that Belmont Abbey College and Pfeiffer College are not "pervasively sectarian."

QUESTIONS PRESENTED

Appellants present three main questions in their Jurisdictional Statement. The first (whether scholarship assistance is aid to institutions) and the third (whether scholarship aid must be available to students attending public and private colleges and universities) do not appear to raise questions under the First Amendment. The second question is the material question which must be the basis for a decision in this appeal. In the language of this Court in prior decisions this question is:

"Are the Board of Governors, under the Contract Program, and the State Education Assistance Authority, under the Tuition Grant and Incentive Grant Programs, allowing state money to fund 'a specifically religious activity' at

Belmont Abbey College and Pfeiffer College, colleges which are not 'pervasively sectarian?'"

Pursuant to Rule 16 of the Court's Rules, a procedural question with respect to this substantive question is now before the Court:

"Does the question raised by this appeal, in light of the Court's prior decisions, present a substantial federal question requiring further review by this Court?"

ARGUMENT

A. *Use of State Funds for Aid to Students at Colleges and Universities Not Pervasively Sectarian is a Secular Use.*

1. *The applicable tests.*

Public aid to church-related institutions is judged by a three-part test to determine violations of the First Amendment:

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; and finally, the statute must not foster 'an excessive governmental entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, at 612-613 (1971).¹

Appellants do not challenge the North Carolina student aid programs on either the first part (secular legislative purpose) or the third part (excessive governmental entanglement) of this test. The questions presented by Appellants in

¹This test was recently reaffirmed in *Wolman, et al. v. Walter, et al.*, — U.S. — (1977).

their Jurisdictional Statement deal solely with the second part, whether the North Carolina aid programs have the primary effect of advancing religion.

Aid to a church-related college or university has the primary effect of advancing religion if:

"... it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt v. McNair, supra*, 413 U.S. at 743.

2. Appellants' contentions.

Appellants contend that these student aid programs have the primary effect of advancing religion because the state has failed to insure that public funds will not be used for sectarian purposes by the students benefited by them and by the institution attended by the students. Without regard to the secular character of Belmont Abbey College and Pfeiffer College or the secular course of study of student recipients, Appellants assert the North Carolina programs are unconstitutional because the statutes and regulations do not require these church affiliated colleges and universities to segregate student aid funds in the school's general fund after the aid funds have been applied to students' accounts, and thereafter, to trace them to a second secular use.

3. These North Carolina student aid programs meet the primary effect test of *Hunt*.

Belmont Abbey College and Pfeiffer College are not "pervasively sectarian" or "subsumed in a religious mission" so that a substantial portion of their functions cannot be separated. Belmont Abbey College and Pfeiffer College are con-

stitutionally eligible to participate in public aid programs. Use of public funds for student assistance at Belmont Abbey College and Pfeiffer College is a secular use and not a "religious" use.

In contending that additional restrictions other than those in existence are necessary to save the three student aid programs from constitutional defects, Appellants disregard the fact that funds have been put to a "use" when applied to students' tuition accounts. Allocation of these funds to students' tuition accounts is a secular use. The funds are the *quid pro quo* in return for which the schools are contractually obligated to provide educational services. The primary benefit of the programs is to the student.

The colleges also benefit and Appellees do not contend that the colleges do not. The colleges' benefit is secondary to that of the student and his family. Any benefit for the religious attributes of Belmont Abbey College or Pfeiffer College is indirect. Assistance to students in the form of scholarship and grant funds to acquire a secular education at institutions such as Belmont Abbey College and Pfeiffer College is at most indirect support of religion and does not have the "primary effect" of advancing religion.

Appellants' argument is the "recurrent argument" that all aid which in some manner benefits religion is constitutionally impermissible. This Court has consistently rejected this argument. (*Hunt v. McNair, supra*, 413 U.S. at 742-743). The District Court's per curiam opinion so identified Appellants' contentions and rejected them as the basis for a constitutional defect in the three aid programs:

"The scholarship and tuition grants with which we are concerned primarily benefit the eligible students and their families. It serves the state's secular purpose in assisting

a North Carolina resident student to attend a private college of his choice. Since the schools here are not pervasively religious and the students receiving assistance are not preparing for a religious vocation, the grant of tuition and scholarship assistance to them is a secular use.

"Of course, the colleges receive a benefit from these funds. Without such funds they might have fewer students, be able to charge less tuition, or be forced to divert other resources to student aid. In either such event, the receipt of these funds may be said to free other college funds for sectarian purposes which, otherwise, might not be available. That, however, is the precise reasoning which the Supreme Court held in *Roemer* was insufficient for First Amendment invalidation of the programs." (See Opinion reprinted at pages A-20-A-21 in the J.S.).

B. Roemer v. Board of Public Works of Maryland is Controlling Precedent for the Question Presented by this Appeal.

Chief Circuit Judge Haynsworth, Chief District Judge Jones and District Judge McMillan found this action to be governed by *Roemer v. Board of Public Works of Maryland, supra*. There are not meaningful differences between Belmont Abbey College and Pfeiffer College and the schools found constitutionally eligible to receive public funds in *Roemer*. The essential provisions of the Maryland and North Carolina statutory provisions are identical. (See Chart printed herein after at page 1-e which was attached to Appellees' memorandum in support of a motion to dismiss filed with the District Court). The only differences in the Maryland program and the North Carolina program are of form and not of substance. The Maryland statute authorized non-categorical grants to the institutions and the institutions selected the

use of those funds. Under the North Carolina programs, the institutions are required to use all funds for student assistance. Any funds not used for student assistance revert to the state.

One of the uses to which the funds in Maryland were put was student financial assistance. The Appellants in *Roemer* made the same argument with respect to the use of the Maryland funds for student financial assistance that these Appellants make — that use of the non-categorical grant for student assistance funds had the primary effect of advancing religion because there was no restriction on the use of the funds by the institution after the funds had been credited to the students' accounts:

"The Act does not restrict use of aid for scholarships. At least one appellee has already used aid for this purpose . . . in administering the Act the state would make no further inquiry as to use upon learning that aid would be used for scholarships . . . therefore, upon crediting students' tuition in the amount of their scholarships, schools are free to use funds without restriction.

"Since there is no effort whatsoever to ascertain that the Maryland aid, when ultimately received by the church related appellees, is confined to secular purposes, the primary effect of aid is to advance religion . . ." Jurisdictional Statement on Appeal from the United States District Court of Three Judges of the District of Maryland, *Roemer, et al. v. Board of Public Works of the State of Maryland, et al.*, at pages 16 and 17.

The *Roemer* appellants also made this contention in their brief. See *Roemer, supra*, 426 U.S. at 760, fn. 22.

This Court did not deal directly with this contention, but approved generally the funds uses by the Maryland institutions, and impliedly, use of the funds for scholarship assistance. *Roemer, supra*, at 759-760. However, this Court acknowledged the *Roemer* appellants' contention with respect to scholarships, and in response, noted approvingly the regulations adopted by the Maryland Council of Education prohibiting the use of state funds for scholarships for students in religious studies. *Id.* This regulation is almost identical to the regulation in the three North Carolina programs excluding students engaged in studies leading to a vocation in religion.

The North Carolina statutory provisions establishing the Contract Program and Tuition Grants restrict use of the funds to "secular educational purposes only." Under *Roemer* this statutory restriction meets the *Hunt* prohibition of public funding of "specifically religious activity." *Id.* The Board of Governors and State Education Assistance Authority have adopted regulations excluding students from the three programs who are engaged in a course of study leading to a career in a religious vocation. These regulations are almost identical to those adopted in *Roemer* which this Court also found satisfied the *Hunt* prohibition. *Id.*

C. In *Durham v. McLeod*, 259 S.C. 409, 192 S.E. 2d 202 (1972), appeal dismissed, 413 U.S. 902 (1973), this Court Rejected a Similar but Broader Issue with Respect to Student Aid.

In the appeal of *Durham v. McLeod, supra*, to this Court, the appellants asked that the following question be considered:

"Do the First and Fourteenth Amendments prohibit a state from giving aid to college level students, in the form of loan or loan guarantees, where there is no prohibition against attending a sectarian institution and no prohibition against pursuing a sectarian course of study?"

In the Jurisdictional Statement the Appellants further contended that the South Carolina loan program was unconstitutional because "the proceeds of a tuition loan at a sectarian school will find their way into the general fund of the school and be available for sectarian uses."

This Court, however, dismissed the appeal "for want of a substantial federal question."

The *Durham v. McLeod* appeal, if accepted on the basis of the statements in the Jurisdictional Statement, concerned student assistance at sectarian institutions. This appeal concerns only student assistance at institutions which have been found to be not "pervasively sectarian." If student aid at sectarian institutions does not present a substantial federal question, student aid at non-sectarian institutions does not either.

D. In *Americans United, et al. v. Rogers*, 538 S.W. 2d 711 (Mo. Sup. Ct. 1976), cert. denied, ___ U.S. ___ (1976), this Court Denied Certiorari to a Challenge to a Missouri Student Assistance Program Similar to the North Carolina Programs.

In *Americans United v. Rogers, supra*, a Missouri student assistance program similar to the North Carolina programs was challenged under the Missouri Constitution and the First Amendment. The only statutory restriction with respect to

use of funds was that awards could not be made to a student enrolled in a course of study "leading to a degree in theology or divinity." Neither the statute nor any regulations implemented thereunder contained a restriction that participating institutions segregate funds after they had been applied to a student's accounts and trace the use of these segregated funds to a secular use. The Missouri Supreme Court, on the authority of *Roemer, supra*, found that this program did not violate the First Amendment. The petition of Americans United, one of the Appellants herein, for a writ of certiorari was denied by this Court on December 13, 1976.

CONCLUSION

After consideration of an extensive record and on authority of *Roemer v. Board of Public Works of Maryland*, the Three-Judge District Court determined that Belmont Abbey College and Pfeiffer College are not pervasively sectarian, that the aid programs primarily benefit the students rather than the colleges, that the aid programs are themselves secular, and concluded that the three programs are "unassailable under the First Amendment of the federal Constitution." The Three-Judge District Court was correct in concluding that these challenged student aid programs meet the requirements announced in *Roemer, supra*:

"... (1) that no state aid at all go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and (2) that if secular activities can be separated out, they alone may be funded."
426 U.S. at 755.

Appellees submit that in view of this Court's decision in *Roemer*, this appeal should be dismissed for "want of a sub-

stantial federal question." Appellees request that the decision of the Three-Judge District Court be affirmed.

Respectfully submitted, this 12th day of August, 1977.

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APPENDIX A

APPENDIX A

Chapter 802, §38 - §38.2 of the 1977 Session Laws of the North Carolina General Assembly.

Sec. 38. Funds appropriated in this act to the Board of Governors of The University of North Carolina for aid to private colleges shall be disbursed in accordance with the provisions of G.S. 116-19, G.S. 116-21, and G.S. 116-22. These funds are to provide up to two hundred dollars (\$200.00) per full-time equivalent North Carolina undergraduate student enrolled at a private institution as of October 1 each year.

These funds shall be placed in a separate, identifiable account in each eligible institution's budget/chart of accounts. All funds in this account shall be provided as scholarship funds for needy North Carolina students during the fiscal year. Each student awarded a scholarship from this account shall be notified of the source of the funds and of the amount of the award. Funds not utilized under G.S. 116-19 shall be for the tuition grant program as defined in Section 38.1 of this act.

Sec. 38-1. In addition to any funds appropriated pursuant to G.S. 116-19 and in addition to all other financial assistance made available to private educational institutions located within the State, or to students attending such institutions, there is hereby granted to each full-time North Carolina undergraduate student attending an approved institution, as defined in G.S. 116-22, the sum of three hundred dollars (\$300.00) per academic year in 1977-78 and in 1978-79 which shall be distributed to the student as hereinafter provided.

The tuition grants provided for in this section shall be administered by the State Education Assistance Authority pursuant to rules and regulations promulgated by the State

Education Assistance Authority not inconsistent with this act. The State Education Assistance Authority shall not approve any grant until there has been received from an appropriate officer of the approved institution a certification that the student applying for the grant is an eligible student. Upon receipt of such certification in proper form, the State Education Assistance Authority shall remit at such times as it shall prescribe the grant to the approved institution on behalf, and to the credit, of such student.

In the event a student on whose behalf a grant has been paid shall not be enrolled and carrying a minimum academic load as of the 10th classroom day following the beginning of the school term for which such grant was paid, the institution shall refund to the State Education Assistance Authority the amount of grant paid on behalf of such student for such term. Each approved institution shall be subject to examination by the State Auditor for the purpose of determining whether such institution has properly certified eligibility and enrollment of students and credited grants paid in the behalf of such students.

In the event there are no sufficient funds to provide each eligible student with a full grant, each eligible student shall receive a reduced but equal share of funds then available for the remainder of the academic year within the fiscal period covered by the current appropriation. Any remaining funds shall revert to the General Fund.

Sec. 38.2. Expenditures made pursuant to Sections 38 and 38.1 of this act shall be used for secular educational purposes only. If any provisions of these sections or the application thereof to any person or circumstances be held invalid, such invalidity shall not affect other provisions or applications of the sections which can be given effect without the invalid provision or application, and to this end the provisions of the sections are declared to be severable.

APPENDIX B

APPENDIX B**20 U.S.C.A. § 1070c.**

(a) It is the purpose of this subpart to make incentive grants available to the States to assist them in providing grants to eligible students in attendance at institutions of higher education.

(b)(1) There are hereby authorized to be appropriated \$50,000,000 for the fiscal year ending June 30, 1973, and for each of the succeeding fiscal years ending prior to October 1, 1979, for payments to the States for grants to students who have not previously been awarded such grants.

(2) In addition to the sums authorized to be appropriated pursuant to paragraph (1), there is authorized to be appropriated such sums as may be necessary for making payments to States to continue their grants to students made with incentive grants received by such States for previous years pursuant to paragraph (1), and to make bonus allotments to States pursuant to section 1070c-4 of this title.

(3) Sums appropriated pursuant to paragraphs (1) and (2) for any fiscal year shall remain available for payments to States for the award of student grants under this subpart until the end of the fiscal year succeeding the fiscal year for which such sums were appropriated.

(4) For the purposes of this subsection, a payment on the first year of a student grant with respect to any student who has not been awarded a grant from appropriations pursuant to paragraph (1) during any previous year shall be considered, subject to regulations of the Commissioner, an initial award to be paid from appropriations pursuant to paragraph (1).

20 U.S.C.A. § 1070c-1.

(a)(1)(A) From the sums appropriated pursuant to section 1070c(b)(1) of this title for any fiscal year, the Com-

missioner shall allot to each State an amount which bears the same ratio to such sums as the number of students in attendance at institutions of higher education in such State bears to the total number of such students in such attendance in all the States.

(B) For purposes of this paragraph, the number of students in attendance at institutions of higher education in a State and in all the States shall be determined by the Commissioner for the most recent year for which satisfactory data are available to him.

(2) The amount of any State's allotment under paragraph (1) for any fiscal year which the Commissioner determines will not be required for such fiscal year for the State student grant incentive program of that State shall be available for reallocation from time to time, on such dates during such year as the Commissioner may fix, to other States in proportion to the original allotments to such States under such part for such year, but with such proportionate amount for any of such States being reduced to the extent it exceeds the sum the Commissioner estimates such State needs and will be able to use for such year for carrying out the State plan; and the total of such reductions shall be similarly reallocated among the States whose proportionate amounts were not so reduced. Any amount reallocated to a State under this part during a year from funds appropriated pursuant to section 1070c(b)(1) of this title shall be deemed part of its allotment under paragraph (1) for such year.

(b) Subject to the provisions of section 1070c-4 of this title, sums appropriated pursuant to section 1070c(b)(2) of this title for any fiscal year shall be allotted among the States in such manner as the Commissioner determines will best achieve the purposes for which such sums were appropriated.

(c) The Commissioner shall make payments for continuing incentive grants only to those States which continue to meet the requirements of section 1070c-2(b)(1), (2), (3), and (5) of this title.

20 U.S.C.A. § 1070c-2.

(a) A State which desires to obtain a payment under this subpart for any fiscal year shall submit an application therefor through the State agency administering its program of student grants, at such time or times, and containing such information as may be required by, or pursuant to, regulation for the purpose of enabling the Commissioner to make the determinations required under this subpart.

(b) From a State's allotment under this subpart for any fiscal year the Commissioner is authorized to make payments to such State for paying 50 per centum of the amount of student grants pursuant to a State program which—

(1) is administered by a single State agency;

(2) provides that such grants will be in amounts not in excess of \$1,500 per academic year for attendance on a full-time basis as an undergraduate at an institution of higher education;

(3) provides for the selection of recipients of such grants on the basis of substantial financial need determined annually on the basis of criteria established by the State and approved by the Commissioner;

(4) provides that, effective with respect to any academic year beginning on or after July 1, 1977, all nonprofit institutions of higher education in the State are eligible to participate in the State program;

(5) provides for the payment of the non-Federal portion of such grants from funds supplied by such State which

represent an additional expenditure for such year by such State for grants for students attending institutions of higher education over the amount expended by such State for such grants, if any, during the second fiscal year preceding the fiscal year in which such State initially received funds under this subpart; and

(6) provides (A) for such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of and accounting for Federal funds paid to the State agency under this subpart, and (B) for the making of such reports, in such form and containing such information, as may be reasonably necessary to enable the Commissioner to perform his functions under this subpart.

(c) Upon his approval of any application for a payment under this subpart, the Commissioner shall reserve from the applicable allotment (including any applicable reallotment) available therefor, the amount of such payment, which (subject to the limits of such allotment or reallotment) shall be equal to the Federal share of the cost of the student incentive grants covered by such application. The Commissioner shall pay such reserved amount, in advance or by way of reimbursement, and in such installments as he may determine. The Commissioner's reservation of any amount under this section may be amended by him, either upon approval of an amendment of the application or upon revision of the estimated cost of the student grants with respect to which such reservation was made, and in the event of an upward revision of such estimated cost approved by him he may reserve the Federal share of the added cost only from the applicable allotment (or reallotment) available at the time of such approval.

20 U.S.C.A. § 1070c-3.

(a)(1) The Commissioner shall not finally disapprove any application for a State program submitted under section 1070c-2 of this title, or any modification thereof, without first affording the State agency submitting the program reasonable notice and opportunity for a hearing.

(2) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State agency administering a State program approved under this subpart, finds—

(A) that the State program has been so changed that it no longer complies with the provisions of this subpart, or

(B) that in the administration of the program there is a failure to comply substantially with any such provisions,

the Commissioner shall notify such State agency that the State will not be regarded as eligible to participate in the program under this subpart until he is satisfied that there is no longer any such failure to comply.

(b)(1) If any State is dissatisfied with the Commissioner's final action with respect to the approval of its State program submitted under this subpart or with his final action under subsection (a) of this section, such State may appeal to the United States court of appeals for the circuit in which such State is located. The summons and notice of appeal may be served at any place in the United States. The Commissioner shall forthwith certify and file in the court the transcript of the proceedings and the record on which he based his action.

(2) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the

court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the transcript and record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) The court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Title 28, section 1254.

APPENDIX "C"

1-c

APPENDIX C

Comparison of Religious Attributes of *Tilton, Hunt, & Roemer* Institutions With Belmont Abbey College & Pfeiffer College

Tilton	Hunt	Roemer
1. All four colleges governed by Catholic religious organizations.	All of Board of Trustees elected by State Baptist Convention which also has power to approve certain financial transactions and exclusive power to amend charter.	All five colleges were church related, (one Methodist and four Catholic).
2. Faculties and student bodies were predominantly Catholic.	60% of student body was Baptist.	Great majority of students at institution were Catholic (four schools) and Methodist (one school).
3. Students at all schools required to take theology courses.		At each school, certain theology (religion) courses are required.
4. All colleges have admitted religious functions.		Spiritual development of the students . . . is a secondary objective of each defendant.
5. Several institutional documents contained religious instructions on what could be taught.		
6. Religious doctrines were taught in some programs.		
7.		Some instructors wear clerical garb.
8.		Some classrooms have religious symbols.
9.		In faculty hiring, inquiry as to religious preference is made orally or by application.

Comparison of Religious Attributes of *Tilton, Hunt, & Roemer* Institutions With Belmont Abbey College & Pfeiffer College

Belmont Abbey College	Pfeiffer College
Governed by self-electing Board of Trustees, who are approved in writing by members of corporation who are members of Belmont Abbey Monastery, and also who have exclusive power to amend charter.	Governed by self-electing Board of Trustees, who are routinely confirmed by WNC Conference of United Methodist Church.
Approximately 60% Catholic.	Approximately 40% Methodist.
2 theology courses required.	2 religion courses required.
Spiritual and moral development of students is a secondary objective.	Spiritual and moral development of students is a secondary objective.
No such restrictions.	No such restrictions.
No such courses.	Christian Education and Church Music prepare students for religious vocations.
Some instructors wear clerical garb.	
Religious symbols are present.	Some religious symbols are present.
No such inquiry is made, though religious affiliation may be ascertained from an applicant's resume.	No such inquiry is made, though religious affiliation may be ascertained from an applicant's resume.

Comparison of Religious Attributes of *Tilton, Hunt, & Roemer* Institutions With Belmont Abbey College & Pfeiffer College

Tilton	Hunt	Roemer
10.		All defendants staffed their religion or theology departments with clerics of affiliated church.
11.	All elected by State Baptist Convention.	Each of defendants, except one, had quotas for membership on the governing board based on religion or membership in religious order.
12.		Religious affiliation of college readily apparent from college catalog.
13.		Western Md. makes annual statistical reports to the Methodist Church.
14.		Western Md. receives annual stipends from the Methodist Church.
15.		The local head of the Catholic Church is an ex-officio member of Board of Trustees.
16.		Religious exercises are held on the campus of each defendant.
17.		Each defendant has a chaplaincy program and chaplain is clergyman of aff. church.
18.		Each defendant maintains a vigorous religion or theology department.
19.		Primary concern of these departments, either admittedly or by obvious thrust of the courses is Christianity.

Comparison of Religious Attributes of *Tilton, Hunt, & Roemer* Institutions With Belmont Abbey College & Pfeiffer College

Belmont Abbey College	Pfeiffer College
Mostly clerics, but include one non-cleric who is member of faith other than Catholic. Has included Jewish and Islamic professors.	All are ministers who have Ph.D. in religion.
5 of 17 of Board of Trustees must be members of Belmont Abbey Monastery.	60% of Board of Trustees must be members of United Methodist Church.
True.	True.
No reports required by Southern Benedictine Society, Inc., Belmont Abbey Monastery or Catholic Church.	No reports required by United Methodist Church or any affiliate.
Receives partial Monk salary remissions from Southern Benedictine Society, Inc. annually.	Has received unrestricted contributions from Board of Global Missions and WNC Conference of United Methodist Church each year.
Abbott of Belmont Abbey Monastery is ex-officio member of Board of Trustees.	
True.	True.
True.	True.
Has a theology department.	Has a religion department.
Probably true.	Probably true.

APPENDIX D

APPENDIX D

Comparison of *Roemer* Schools With Belmont Abbey College
and Pfeiffer College With References to Record

Roemer	Belmont Abbey College	Pfeiffer College
1. Each defendant subscribes to the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors.	¶44—BNSF; TR 81: 17-22; 139: 8-12; 146: 15; 148: 7	¶18—PNSF; TR 177: 21-25; 199: 1-6
2. Faculty feel no religious pressures by anyone on their classroom presentation or their selection of texts and course materials.	¶45 and 47—BNSF; TR 138: 6-17	¶20—PNSF; ¶20(a)—PNSF; TR 197: 8—198: 15; 198: 20-25
3. There has been no showing that religion slants the conduct of classes at the defendant institutions; this litigation demonstrates the opposite to be true.	¶43-47—BNSF; TR 81: 17-22; 139: 8-12; 146: 15—148: 7; 77: 4-5; 81: 23—82: 2; 88: 1-20; 120: 10—121: 14; 139: 13-25	¶¶17-20 PNSF; ¶¶17(a), 20(a), 20(b) and 24(b)—PNSF; TR: 177: 21-25; 199: 1-6; 197: 8—198: 15; 198: 20-25; 153: 7—155: 8; 196: 3—198: 15; 199: 7-13; 211: 17-24; 214: 23—215: 2
4. No complaint has ever been made to the AAUP regarding religious bias in hiring of faculty.	¶44(a)—BSNSF; TR: 81: 23—82: 2	¶18(A)—PSNSF; TR: 181: 14—182: 3
5. Courses at each defendant are taught "according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards."	See all references listed above. TR 138: 10-2; 136: 15-22	See all references listed above. TR 196: 3—197: 22
6. Faculty members of each defendant . . . impress the Court as professionals who value academic freedom and "see no place for religious bias in liberal arts education".	The Court has had an opportunity to observe faculty members from both schools.	The Court has had an opportunity to observe faculty members from both schools.

Comparison of *Roemer* Schools With Belmont Abbey College
and Pfeiffer College With References to Record

Roemer	Belmont Abbey College	Pfeiffer College
7. At St. Josephs College . . . a Maryland education group which monitored the teachers education program at the College saw no evidence of religion entering into any elements of that program.	¶52—BNSF	¶17—PNSF; PC Ex. #11
8. Hiring decisions are effectively low-level and participatory. At no defendant was there dominance on the faculty by one religious group; hiring bias would not escape the attention of members of other religious groups.	¶¶36-40—BNSF; ¶36(A) BSNSF TR: 71: 11—72: 5; 134: 9-17	¶¶24-26—PNSF; TR: 21: 2-15; 213: 3—214: 13
9. Analysis of the student admission and recruiting criteria of each defendant demonstrates that the student bodies are chosen without regard to religion.	Ex. #2 and 5; ¶¶35 and 36—BNSF; TR: 80: 2—81: 16; 118: 14-17	Ex. #7; ¶¶27, 28, and 29—PNSF; TR: 150: 25—151: 5; 176: 20—177: 20
10. No aspect of the student conduct code at any defendant institution has any religious content.	Ex. #1; TR: 77: 9—78: 9; 122: 12—123: 7	¶33(a) PSNSF; Ex #1 and 2; TR: 158: 21-25
11. None of the defendants require attendance at any religious exercise.	¶¶54 and 55—BNSF; TR: 88: 18-20; 121: 18—122: 11	¶34 and ¶16—PNSF; TR: 155: 9-14; 156: 4-6; 178: 22-24
12. At none of the institutions does this encouragement (spiritual emphasis) go beyond providing the opportunities or occasions for religious experience.	¶54—BNSF	¶34—PNSF

Comparison of *Roemer* Schools With Belmont Abbey College
and Pfeiffer College With References to Record

Roemer	Belmont Abbey College	Pfeiffer College
13. There is no actual college policy encouraging prayer in class.	¶50—BNSF; TR 88: 23-25; 123: 8-20; 138: 13-24	¶35—PNSF; TR 158: 14-16; 178: 25—179: 2
14. None of the defendants (ex. W. Md.) make reports to institutional church.	¶24A—BSNSF	¶5A; TR: 175: 10-13
15. None of the defendants (ex. W. Md.) receive aid from institutional church.	¶12A—BSNSF	Receives aid from the Western North Carolina Conference of the United Methodist Church and the Board of Global Ministries. See TR: 174: 19—175: 9
16. There is no effort by the Church to parlay the funds or reports into control over the college.	¶23(a)—BSNSF	¶5(B)—PSNSF
17. Religious indoctrination is not a substantial purpose or activity of any of these defendants.	All of the above references and TR: 91: 2-16; 88: 6-20; 139: 16-18	All of the above references and TR 181: 14—182: 3; 178: 12-21

TR—Transcript of Evidentiary Hearing on November 1, 1976

BNSF—Belmont Abbey College's Narrative Statement of Facts (File Docket #104)

BSNSF—Belmont Abbey College's Supplemental Narrative Statement of Facts (Introduced at Evidentiary Hearing)

PNSF—Pfeiffer College's Narrative Statement of Facts (File Docket # 99)

PSNSF—Pfeiffer College's Supplemental Narrative Statement of Facts (Introduced at Evidentiary Hearing)

Ex.—Exhibits Introduced at October 15, 1976, Conference

APPENDIX E

APPENDIX E

**Comparison of North Carolina and Maryland Statutory
Provisions Relative to Grants to Private Colleges and
Universities and to Students Attending Private
Colleges and Universities**

Maryland	North Carolina
1. Program originated in a study by Maryland Council on Higher Education.	1. Programs originated in study by State Board of Higher Education.
2. Excludes institutions awarding only seminarian or theological degrees.	2. Excludes Bible colleges, Bible schools, seminaries and other institutions awarding primarily religious or theological degrees.
3. Accreditation by State Department of Education.	3. Accreditation by Southern Association of Colleges and Universities.
4. Use of funds—none of the monies shall be utilized by the institution for sectarian purposes.	4. Use of funds—funds are to be used only for secular purposes.
5. Administration—Maryland Council of Higher Education A. a public board B. previous experience in education in Maryland	5. Administration—Board of Governors and State Education Assistance Authority A. public boards B. previous experience in higher education in North Carolina
6. Preliminary screening of institutions awarding theological or seminary degrees by Maryland Council of Higher Education excluded certain institutions.	6. Preliminary screening of seminaries, Bible colleges, Bible schools, or similar religious institutions by State Education Assistance Authority and Board of Governors excluded A. John Wesley Bible College B. Piedmont Bible College C. Pilgrim Bible College.
7. Each institution by its chief executive officer required to verify compliance with statutory provisions.	7. Each institution by its chief executive officer required to verify compliance with statutory provisions.
8. State agency has authority to prescribe regulations.	8. State agency has authority to prescribe regulations.
9. State agency has authority to audit institutional records to verify compliance.	9. State agency has authority to audit institutional records to verify compliance.
10. Non-categorical grants made annually.	10. Funds distributed annually.